

SPECIAL CIVIL APPLICATION No 3884 of 1995

Hon'ble MR.JUSTICE S.D.SHAH

JJJ

J

5. Whether it is to be circulated to the Civil Judge? No

Versus

Appearance:

MR G.M. JOSHI FOR MR. YN OZA for Petitioner
MR. A.R. THAKKAR FOR MR JR NANAVATI for Respondent No. 1
MR. B.Y. MANKAD, AGP as instructed by
MR DA BAMBHANIA for Respondent No. 3
SERVED BY DS for Respondent No. 4
MR HJ NANAVATI for Respondent No. 5

Date of decision: 13/12/96

ORAL JUDGEMENT

1. By this petition under Article 226 of the Constitution of India the petitioner has challenged the action of the Director, Gujarat Agricultural University, Krushinagar Vidyalaya, in not appointing him to the post of Assistant Teacher (Biology), in the school, known as "Sardar Krushinagar Vidyalaya". It is his main challenge in the petition that the appointment of Respondent No.5 Maheshkumar Ishwarbhai Prajapati is based on extraneous irrelevant and non-germane factors and that strictly, legally and as per selection he was entitled to be appointed to the post of Assistant Teacher (Biology) but he was denied such appointment and respondent No.5 is illegally and unconstitutionally continued on the post and hence the present petition is filed under Article 226 of the Constitution of India for appropriate direction to the respondent university.

2. There is no dispute about the fact that post of Assistant Teacher(Biology) was created for the first time in the year 1992 and without following any procedure for selection, respondent No.5 came to be appointed on honorarium over the said post subject, of course, to his being regularised after his due selection in accordance with law by the Selection Board. Unfortunately, despite following the entire procedure for selection and finding that petitioner herein was a more meritorious and better candidate entitled to be appointed to the post of Assistant Teacher (Biology), than the Respondent No.5, he having obtained more marks in the selection, he has been denied the benefit of appointment to the post of Assistant Teacher (Biology) and hence the present petition.

3. The following brief relevant facts are material and are required to be stated so as to properly bring out the case of the petitioner in this petition.

(i) The post of Assistant Teacher (Biology) was created and was to be filled-in in accordance with law after following the process of selection. It is not disputed that the petitioner was possessing the necessary qualification of M.Sc. and B.Ed. which was sufficient and to treat him eligible for appointment to the said post of Assistant Teacher.

(ii) An advertisement was issued by Sardar Krushinagar Vidyalaya inviting applications from all eligible candidates for the post of Assistant Teacher

(Biology) and it is also not disputed that pursuant to said advertisement, the present petitioner, since he was eligible and possessing necessary educational qualification, applied for the post as well as respondent No.5 also applied for the post of Assistant Teacher.

(iii) It is not disputed before this Court by the Gujarat Agricultural University - Respondents No. 1 and 2 herein that advertisement duly appeared in Sandesh Daily on 2nd September, 1993 and pursuant to such advertisement, applications were received for the post of Assistant Teacher (Biology) both from the petitioner as well as from the respondent No.5 on or around 4th of September, 1993.

(iv) It is also not at all seriously disputed before this Court that in fact Government granted sanction for the post of Assistant Teacher (Biology) in the month of August 1993 and it was pursuant to such sanction and NOC that the advertisement was issued for selection of the appropriate and meritorious candidate.

(v) Unfortunately, prior thereto, respondent No.5 was appointed on his showing readiness to work as Assistant Teacher in the subject of Biology and he was permitted to work on honorarium from 29th April, 1992 on the post of Assistant Teacher (Biology) without any regular remuneration or without issuance of any legal appointment order.

(vi) Immediately after such irregular appointment which was simply an appointment on honorarium even prior to the sanction of the post by the State of Gujarat, the respondent No.5 herein instituted an Application before the Gujarat Higher Secondary Tribunal being Application No. 192 of 1993 and contended that since he was appointed and working as Assistant Teacher (Biology) in the school since long time, he should be regularised and made permanent and that he should be paid the regular remuneration as is being paid to the other Assistant Teachers of the school.

(vii) Unfortunately, the Tribunal in its haste to do justice and without definite intention to perpetrate injustice, proceeded to decide the application in most arbitrary, capricious and

illegal manner and directed to regularise the appointment of respondent No.5 as Assistant Teacher (Biology) despite the fact that such action of the Tribunal was initially opposed tooth and nail by the University by citing various authorities and also by relying upon the fact that, in the process of selection which was undertaken, the petitioner was selected and respondent No.5 was not selected.

(viii) It may be mentioned at this stage that in fact pursuant to the advertisement issued by the school, the petitioner and the respondent No.5 applied for the post along with other eligible candidates and were called for interview along with other eligible candidates and the Interview Committee consisting of Mr. B.R. Patel, the Principal of the Vidyalaya, Dr. G.S. Judal, Director of Campus, Gujarat Agricultural University and M.R. Patel, representative of District Education Officer, undertook the process of selection and selected petitioner to the post of Assistant Teacher, Biology by allotting him 46.6 marks while allotting 45.9 marks to respondent No.5 and the Interview Committee decided to send the name of the petitioner for approval to the District Education Officer. In the meantime, as stated hereinabove, respondent No.5 approached the Tribunal by instituting Application No. 192 of 1993 and in the judgment which is based on absolutely irrelevant and non-germane factors and consideration, the Tribunal has gone amok and has ordered the appointment of respondent No.5 on the post of Assistant Teacher (Biology) in total violation of the norms of selection and in blatant disregard of Articles 14 and 16 of the Constitution of India. The Tribunal has rendered itself open to serious criticism by this Court as conduct of Tribunal is not only blameworthy but cannot be said to be above-board especially when it has proceeded to crush mercilessly the rights of an employee selected on the post of Assistant Teacher (Biology) and has ordered regularisation of an employee who has been positively not selected on the post and the tribunal has even directed to give appointment and to give him all back wages. The brazen faced order of the Tribunal, notwithstanding the knowledge on its part of obligation on the Institution to duly follow the process of selection in accordance

with law by duly constituted selection committee has not only shocked the conscientious of this court but learned single judge of this court while entertaining this petition passed interim order restraining Respondent No.5 from discharging his duties as Assistant Teacher (Biology). Had this Court been conducting proceedings like this under its power of superintendence it would have called for explanation of Tribunal as to why it acted so arbitrarily, capriciously, whimsically and discriminatorily so as to deny the right of a selected candidate in preference to the right of candidate who has been found to be less meritorious on all counts and has been not recommended for the post of Assistant Teacher, Biology.

4. As pointed out hereinabove, the Tribunal by its absolutely unmaintainable and unsustainable judgment and order, ordered reinstatement of respondent No.5 with full back wages and regularisation and because such an order was passed by the Tribunal, respondent No.5 became large-hearted so as to give an application in the year 1994 even not to claim back wages from the school management and stating that his appointment to the post of Assistant Teacher be anyhow regularised on condition that he would not claim any back wages. Unfortunately, the University not following the procedure of law and admittedly being guided by the fact that the respondent No.5 was giving an undertaking not to claim any back wages which would obviously lessen the burden of the University, proceeded to even withdraw the petition which the University has filed earlier in this Court challenging the judgment and order of the Tribunal being Spl. C.A. No. 6449 of 1994. The said Spl. C.A. came to be withdrawn by the University brazen facedly and in total ignorance of its obligation/duty towards the selected employee and solely with a view to save the payment of back wages or with a view to seeing that respondent No.5 is anyhow regularised despite his non-selection to the post.

5. Even at the admissional stage, C.K. Thakkar, J. found the blatant, illegal and invalid order of appointment issued to respondent No.5 and in fact directed by interim order that respondent No.5 should not be permitted to continue to hold the said post as it was even contrary to the selection made by the Interview Committee. But, unfortunately, however, the learned Single Judge failed to issue mandatory direction to

consider the case of petitioner for appointment as he was selected and topped the merit list. As is usual, the matter rested there and the present petition is now placed before this Court, petitioner claiming to be entitled to the said post as he has been selected by duly constituted Selection Committee and he has been placed at Serial No. 1 in the merit list i.e. at top in the merit list.

6. The underlying principles of Articles 14 and 16 of the Constitution of India and more particularly the rule of following the independent process of selection while offering appointment to the eligible candidate based on his selection is by this time repeatedly stated by the Apex Court in large number of decisions and this Court need not multiply the same. In fact, the University also believed that more meritorious candidate ought to have been appointed on the post of Assistant Teacher (Biology) and that is why the Institute undertook the process of selection by inviting applications from eligible candidates by issuing advertisement and admittedly the petitioner and respondent No.5 both appeared at the interview. Respondent No.5 brazenly submitted to the jurisdiction of the Interview Committee and also agreeing to abide by the selection of the Selection Committee for the post of Assistant Teacher (Biology). He having submitted to the process of selection and not anywhere shown his objection to the effect that he was otherwise entitled to be regularised despite his non-selection on the post, cannot now be permitted to blow hot and cold or to approbate and reprobate to say that despite his surrender to the jurisdiction of the Selection Committee and despite his non-selection by the Interview Committee, he should be appointed to the post of Assistant Teacher (Biology). In fact it would be a relief which cannot be granted to a person, who has so obviously submitted to the jurisdiction of the Selection Committee or Interview Committee and who has accepted to abide by the decision of the Selection Committee. The process of selection has at its roots the basic ideology of recognising the merits of the candidates and selecting meritorious candidates to less meritorious candidates and in absence of any allegation of bias operating the Interview Committee or allegation of irregularity in the process of selection, even the Administrative Law does not allow the court of law to interfere with the process of selection undertaken by the duly constituted Interview Committee. In fact, the very heart of Article 16 which is throbbing by the authority of equality of opportunity in the matter of appointment would receive a set back or would be

smothered if the courts of law are to put their imprimatur on the illegal action of obtaining order of regularisation from the Tribunal which has no jurisdiction to order regularisation and when directions issued by tribunal are absolutely unsustainable directions not supported nby any authority of law. The process of selection having not been challenged before this Court it is an admitted fact that petitioner stood first in the meritlist while respondent No.5 was dragging behind and was not even included in the merit list. In fact, therefore, the petitioner was entitled to be appointed to the post of Assistant Teacher (Biology) and the said appointment is unfortunately denied to him because of the direction obtained by respondent No.5 from the Gujarat Higher Secondary Tribunal and because of his subsequent conduct of not claiming back wages if he is regularised which is the principal factor on which the University has withdrawn the petition filed in the High Court of Gujarat challenging the decision of the Tribunal. The University has acted arbitrarily and based on total non-germane and irrelevant factors of saving the back wages and in fact the university has admitted before the court that the decision was taken firstly with a view to save back wages and secondly with a view to seeing that the school is not placed to any financial burden and as the respondent No.5 was waiving his right of claiming back wages, his appointment was ordered to be regularised. This unfortunately does not lie in the mouth of a public institution governed by Article 12 of the Constitution of India and even if such an approach is found to be out of sheer exigencies, it cannot be permitted to continue any longer to continue Respondent No. 5 as respondent No.5 is not found to be meritorious enough for being selected to the post of Assistant Teacher (Biology).

7. Unfortunately because of the aforesaid position, the University withdrew the petition which it filed in the High Court of Gujarat challenging the order of the Tribunal and continued the respondent No.5 in service and that led the present petitioner to file the petition to ventilate his grievance that despite his selection on the post of Assistant Teacher (Biology) by the Interview Committee on merits he has been denied the appointment to such post. Such being the facts staring this Court, the conscientious of the Court is bound to be shaken and the faith which the judiciary ordinarily has reposed in the tribunals under the establishment of law would be shaken or the foundation of faith reposed in the Tribunals would be demolished so much so that it pains so to this court that the order of the tribunal was in every respect a

compromise, a compromise with one's own conscientious, a compromise with statutory principles of law and a very unfortunate compromise which suppressed, oppressed, confined and smothered Article 16 to non-existence. A Tribunal could not have passed such order but unfortunately it passed the order regularising respondent No.5 and such an order being blatantly without jurisdiction and in total disregard of Articles 14 and 16 of the Constitution of India, is required to be quashed and set aside and is hereby quashed and set aside.

8. The question now is as to whether mandatory direction should be issued to appoint the petitioner to the post of Assistant Teacher (Biology) pursuant to his selection to the post and his placement at Serial No. 1 in the select list. Ordinarily, such directions are rarely issued or not issued because to appoint or not to appoint a person duly selected, is a matter of ultimate discretion of the authority and despite selection, the authority may refuse appointment if it decides not to fill the post at all. Ordinarily, therefore such mandatory directions are not issued and the authority is directed to consider the recommendation and to appoint consistent with such recommendation. However, in the peculiar facts of this case, which has sufficiently shocked the conscientious of this court and when blatant injustice is done to a candidate who has been selected for the post of Assistant Teacher (Biology) after following the due process of law, this Court feels that the relief of immediate consideration of the petitioner has been denied to the candidate solely because it is a matter of discretion of the authority. The unfettered and unrestricted discretion runs amok and very often reverse the democratic process and more particularly the equality before the laws and equality in the matter of employment. In order to avoid that and to stop the discretion running riot, judicial discretion is required to be exercised and such discretion, if it is to be properly exercised, must result into issuing direction to the respondent authorities to consider and appoint the present petitioner to the post of Assistant Teacher (Biology) on his being otherwise eligible for such appointment with immediate effect.

9. In the result, petition succeeds. The respondents are directed to consider and appoint the petitioner to the post of Assistant Teacher (Biology) pursuant to his selection by the Interview Committee and his placement at Serial No. 1 in the merit list and to follow the procedure of law thereafter so as to obtain necessary approval of the authority for his appointment

to the post. In the result, the petition succeeds. Rule
is made absolute to the aforesaid extent. There shall be
no order as to cost.
